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February 20, 2001

TO: Commissioners, Public Disclosure Commission

FROM: Nancy Krier, Assistant Attorney General *NK*

SUBJECT: DECEMBER 7, 2000 PETITIONS FOR AMENDMENT  
TO WAC 390-16-309 AND REPEAL OF WAC 390-16-311  
FROM ROBERT M. EDELMAN

This memorandum summarizes the background for your discussion on the Petitions for Amendment to WAC 390-16-309 ("Identification of Affiliated Entities") and WAC 390-16-311 ("Automatically Affiliated Entities Maintaining Separate Contribution Limits") dated December 7, 2000 and submitted by Robert M. Edelman. The petitions are on your February 27, 2001 agenda.

## PETITION PROCESS

Under the State Administrative Procedure Act, RCW 34.05.330, any person may petition an agency requesting the adoption, amendment, or repeal of any rule. Within 60 days after submission, the agency shall either (a) deny the petition or (b) initiate rulemaking proceedings. A copy of the full statute is attached. If the petition is denied, the petitioner may seek review under certain circumstances with the joint administrative rules review committee, and may appeal to the governor.

## TWO PETITIONS

In the present case, you have received two petitions. A CR 101 (preproposal statement of inquiry) has been filed in the Washington State Register by PDC staff to explain to the public and interested persons that you have received the petitions, and will consider them at your February meeting. Information concerning the petitions has also been placed on your website. You have copies of the petitions in your packets.

One petition seeks amendment to WAC 390-16-309. The second petition seeks repeal of WAC 390-16-311. The Commission unanimously adopted both these rules in 1994. In the petitions, Mr. Edelman claims that WAC 390-16-309 is not clear and should be amended for the additional reasons specified in his petition to amend WAC 390-16-311. In that second petition, Mr. Edelman argues that the rule is not clear, it is not authorized, and it conflicts with RCW 42.16.660 ("Affiliations of Contributions by

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Controlled Entities.”) You have copies of the rules and statute in your packets. Further, Mr. Edelman also argues that the following reasons require the rules to be amended:

1. RCW 42.17.660(2) requires controlled entity contributions to be attributed to a single entity.
2. WAC 390-16-311 amended the statute in an arbitrary and capricious manner by adding an exception to the single entity requirement with no statutory foundation.
3. Federal law governing similar federal provisions does not allow for each controlled entity to maintain a separate contribution limit.
4. WAC 390-16-311 grants exceptions to selected organizations without authority.
5. Large organizational contributors continue to have a disproportionate influence on elections because WAC 390-16-311 illegally permits multiple units to have separate contribution limits.

## BRIEF HISTORY

At your meeting, the rulemaking history of these two rules will be explained in more detail. By way of brief history, the voters approved Initiative 134 in November 1992 and it became effective in December 1992. Among many other things, the initiative limited contributions by certain entities. That portion of the initiative was codified at RCW 42.17.660. The subsection at issue in the petitions is (2). The statute in full reads [with subsection (2) in bold]:

- (1) A contribution by a political committee with funds that have all been contributed by one person who exercises exclusive control over the distribution of the funds of the political committee is a contribution by the controlling person.
- (2) **Two or more entities are treated as a single entity if one of the two or more entities is a subsidiary, branch, or department of a corporation or a local unit, branch, or affiliate of a trade association, labor union, or collective bargaining association. All contributions made by a person or political committee whose contribution or expenditure activity is financed, maintained, or controlled by a trade association, labor union, collective bargaining association, or the local unit of a trade association, labor union, or collective bargaining organization are considered made by the same person or entity.**

The PDC began rulemaking activities in 1993 to implement the initiative, including this statute. The two rules at issue with the petitions were adopted as final rules in early 1994. The rulemaking was quite involved, and was addressed at several PDC meetings and in many meetings and correspondence with stakeholders. PDC staff and attorneys gave considerable work and thought to the rules, with extensive input over an

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almost nine-month period from the public as well as considerable direction from the Commissioners. As noted, the Commission adopted the final rules unanimously.

The rules have now been in place for almost seven years. Since adoption, the Legislature has not acted to repudiate the PDC's interpretation of this statute as it is implemented through the rules. No court actions were ever initiated by any group to challenge the rules. You may recall that one of the rules was the subject of a PDC complaint in 1999, which was also initiated by Mr. Edelman through a 45-day letter. That case was Laborers' International Union of North America (LIUNA), PDC No. 99-070. The Commission dismissed the complaint, and there were no appeals or other court action by Mr. Edelman involving that case or the rule. In sum, with the exception of the present petitions by Mr. Edelman, no person or organization has expressed confusion over the rules, or has submitted requests for the Commission to amend or clarify the rules, or has otherwise sought court action to invalidate the rules.

## SUMMARY OF THE RULES

The rules implement RCW 42.17.660 as follows.

### > Two types of Affiliations:

The first PDC rule, **WAC 390-16-309**, implements two different types of organizational relationships or affiliations: *automatic vertical affiliation*, and *other types of affiliation* (sometimes referred to as horizontal affiliation, and is determined by using a factor test).

***AUTOMATIC VERTICAL AFFILIATION.*** The first sentence of RCW 42.17.660(2) requires that, "**Two or more entities are treated as a single entity if one of the two or more entities is a subsidiary, branch, or department of a corporation or a local unit, branch, or affiliate of a trade association, labor union, or collective bargaining association.**" This type of structural relationship, or affiliation, has over the years been called "vertical affiliation." **WAC 390-16-309(1)** implements this part of the statute by specifying the types of organizations that are automatically affiliated. This means that such organizations share one contribution limit. Thus, for example, if a labor union includes a national, state and three local units, each local unit shares a contribution limit vertically with the state entity and the national entity. However, this automatic vertical affiliation is the only type of affiliation addressed by the first sentence of .660(2). By adopting **WAC 390-16-309(1)**, the Commission said unequivocally that it did not believe that this first sentence of this subsection of law established that one local unit of a labor union was automatically affiliated with another local unit unless their shared state or international units effectively affiliated the local units because the state or national was participating in a candidates' campaign. (That is, the Commission, based upon the

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language of .660(2), determined that local units do not share a limit with each other and they do maintain their own limit if the higher levels of the organization "stay out" of the election, thereby "breaking the link" in the vertical affiliation. The "staying out" rule will be discussed in more detail shortly.]

*OTHER TYPES OF AFFILIATION (FACTOR TEST).* The second sentence of RCW 42.17.660(2) requires that, **"All contributions made by a person or political committee whose contribution or expenditure activity is financed, maintained, or controlled by a trade association, labor union, collective bargaining association, or the local unit of a trade association, labor union, or collective bargaining organization are considered made by the same person or entity."** This "other" type of affiliation or relationship is implemented by the analysis of financial/maintenance/control factors, which are explained in WAC 360-16-309(3). Organizations that satisfy this "other" test share one contribution limit. Thus, under this test, for example, if a local unit finances, maintains or controls another local unit, these local units share one contribution limit. Similarly, if a state unit finances, maintains or controls a local unit pursuant to 309(3), then they share a limit. [In other words, if either participates in a campaign and the state unit controls the local unit, then the state unit has not "stayed out" and pursuant to 311(1), the entire organization shares one contribution limit. See next discussion.]

## > The "Staying Out" Rule

A second PDC rule, WAC 390-16-311, further implements the statute. That rule provides that a local unit that is vertically affiliated can maintain its own separate contribution limit from other local units of an organization if: (1) it does not meet the "other" affiliation factor test, and (2) the "parent" organization does not participate in an election (that is, "stays out" of the election --- the "parent" does not engage in any of the other activities described in 390-16-311 such as making contributions or independent expenditures, making an endorsement, etc.). This rule was addressed in the LIUNA case, where the Commission at the January 25, 2000 meeting determined that although the LIUNA and its subordinates are affiliated under WAC 390-16-309(1), LIUNA had "stayed out" of elections over the past six years under 390-16-311, so each local maintained its own limit.

## RESPONSE TO PETITIONS

With this background in mind, staff requests that you deny the petitions. While in its initial review of the law the Commission in 1994 considered the interpretation of the statute now offered by Mr. Edelman, upon much consideration and legal analysis, and input from many groups, the Commission determined that the statute was to be implemented as the current rules direct. The Commission found the interpretations in the

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rules supportable and consistent with the statute and the realities of organizational structures. As will be explained in more detail at your February meeting, in reviewing to Mr. Edelman's five reasons to amend the rules, staff would respond as follows:

1. "RCW 42.17.660(2) requires controlled entity contributions to be attributed to a single entity." *RESPONSE*: Yes, if they are vertically affiliated under 309(1) or if one local unit controls the other pursuant to 309(3), they share a limit. Both sentences of subsection (2) of the statute must be read and given meaning, and that is what the PDC's two rules do.
2. "WAC 390-16-311 amended the statute in an arbitrary and capricious manner by adding an exception to the single entity requirement with no statutory foundation." *RESPONSE*: No. There was no arbitrary and capricious action. The rule was developed with much thought and input from the public, and does not create an exception to the statute. It merely implements the statute in a logical manner. Even if there is room for other opinions, that does not mean the Commission's interpretation is arbitrary and capricious. The courts have given great weight to the Commission's interpretation of chapter 42.17 RCW for those portions it implements.
3. "Federal law governing similar federal provisions does not allow for each controlled entity to maintain a separate contribution limit." *RESPONSE*: Federal elections law, while considered during the Commission's rulemaking process, does not preempt the state law at issue here.
4. "WAC 390-16-311 grants exceptions to selected organizations without authority." *RESPONSE*: WAC 390-16-309 and 311 merely interpret and clarify the statutory language in a reasonable and logical manner. What Mr. Edelman calls an "exception" is nothing more than a practical application of the statutory language. Moreover, the "staying out" rule is consistent with other PDC statutes and rules in the scope of PDC regulation: with respect to elections and campaigns, the PDC does not regulate entities that do not engage in the elections or campaign process.
5. "Large organizational contributors continue to have a disproportionate influence on elections because WAC 390-16-311 illegally permits multiple units to have separate contribution limits." *RESPONSE*: The petition seeks to regulate in a manner that was ultimately not adopted as a reasonable interpretation of the statute by the Commission, and currently is not consistent with case law trends regarding limiting free speech rights and participation by organizations in the political process. If the petitioner seeks additional restrictions on large organizations that wish to participate in the political process, he should seek such authority from the Legislature.

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In sum, the regulations, while complex, are clear. They are authorized by RCW 42.17.660 and the Commission's authority to adopt rules at RCW 42.17.370. The regulations do not conflict with state law; they interpret and implement state law.

I trust this information assists you. More discussion of these points will be provided at the February meeting.

Enclosure

agency shall either (a) deny the petition in writing, stating (i) its reasons for the denial, specifically addressing the concerns raised by the petitioner, and, where appropriate, (ii) the alternative means by which it will address the concerns raised by the petitioner, or (b) initiate rule-making proceedings in accordance with RCW 34.05.320.

(2) If an agency denies a petition to repeal or amend a rule submitted under subsection (1) of this section, and the petition alleges that the rule is not within the intent of the legislature or was not adopted in accordance with all applicable provisions of law, the person may petition for review of the rule by the joint administrative rules review committee under RCW 34.05.655.

(3) If an agency denies a petition to repeal or amend a rule submitted under subsection (1) of this section, the petitioner, within thirty days of the denial, may appeal the denial to the governor. The governor shall immediately file notice of the appeal with the code reviser for publication in the Washington state register. Within forty-five days after receiving the appeal, the governor shall either (a) deny the petition in writing, stating (i) his or her reasons for the denial, specifically addressing the concerns raised by the petitioner, and, (ii) where appropriate, the alternative means by which he or she will address the concerns raised by the petitioner; (b) for agencies listed in RCW 43.17.010, direct the agency to initiate rule-making proceedings in accordance with this chapter; or (c) for agencies not listed in RCW 43.17.010, recommend that the agency initiate rule-making proceedings in accordance with this chapter. The governor's response to the appeal shall be published in the Washington state register and copies shall be submitted to the chief clerk of the house of representatives and the secretary of the senate.

(4) In petitioning for repeal or amendment of a rule under this section, a person is encouraged to address, among other concerns:

- (a) Whether the rule is authorized;
- (b) Whether the rule is needed;
- (c) Whether the rule conflicts with or duplicates other federal, state, or local laws;
- (d) Whether alternatives to the rule exist that will serve the same purpose at less cost;
- (e) Whether the rule applies differently to public and private entities;
- (f) Whether the rule serves the purposes for which it was adopted;
- (g) Whether the costs imposed by the rule are unreasonable;
- (h) Whether the rule is clearly and simply stated;
- (i) Whether the rule is different than a federal law applicable to the same activity or subject matter without adequate justification; and
- (j) Whether the rule was adopted according to all applicable provisions of law.

(5) The department of community, trade, and economic development and the office of financial management shall coordinate efforts among agencies to inform the public about the existence of this rules review process.

(6) The office of financial management shall initiate the rule making required by subsection (1) of this section by September 1, 1995. [1998 c 280 § 5; 1996 c 318 § 1; 1995

**34.05.330 Petition for adoption, amendment, repeal—Agency action—Appeal.** (1) Any person may petition an agency requesting the adoption, amendment, or repeal of any rule. The office of financial management shall prescribe by rule the format for such petitions and the procedure for their submission, consideration, and disposition and provide a standard form that may be used to petition any agency. Within sixty days after submission of a petition, the